



September 4, 2009

**North Dakota Board of University and School Lands
1707 North 9th Street
Bismarck, North Dakota 58506-5523**

Request For Proposals to Provide an Analysis of the Ordinary High Water Mark (OHWM) of the Missouri River Bed Under Lake Sakakawea and to Provide Information as to the Methodology Proposed for the Above Procedure Including Interpretation and Presentation of the OHWM Delineations

I. INTRODUCTION.

The North Dakota Board of University and School Lands is responsible for managing associated mineral interests under sovereign lands, according to North Dakota Century Code ("N.D.C.C.") chapters 15-08.1 and 61-33. North Dakota's sovereign lands are those areas, including the beds and islands lying within the OHWM of navigable lakes and streams.

The Board of University and School Lands (hereinafter "State") is requesting qualifications and proposals for a survey to delineate OHWM of the Missouri River under part of Lake Sakakawea. The State also requests a detailed explanation of proposed methodology and technology to correctly identify and delineate OHWM as part of the bidder's proposal. Specifically the tract to be analyzed is follows:

- 1-A) Beginning at mile marker 1482 at the approximate northern border of the Fort Berthold Indian Reservation north-westerly upstream to mile marker 1574.5, a distance of ninety-two and one half (92.5) river miles.

Exclusions: The Trenton Loop area in 15-152-103 where the Corps of Engineers dredged a new channel creating Trenton Loop.

II. BACKGROUND.

The delineation of the ordinary high water mark is a critical component of sovereign land management, because it identifies the specific areas in and around the state's navigable waters that are under the jurisdiction of the State Engineer and the Board of University and School Lands.

As defined in North Dakota's Administrative Code, Ordinary High Water Mark "means that line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable streams and waters are considered to be below the ordinary high watermark in their entirety."

The North Dakota Supreme Court has further defined "high water mark" as:

"[w]hat its language imports - a water mark. It is co-ordinate with the limit of the bed of water, and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined line of demarcation between the bed and the banks. In such cases the effect of the water upon vegetation must be the principal test in determining the location of high water mark as a line between the riparian owner and the public. It is the point up to which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop."

Areas below the OHWM may have vegetation suitable for grazing but wetland vegetation capable of being grazed is not an "ordinary agricultural crop". The Office of the State Engineer has published Ordinary High Water Mark Delineation Guidelines. Contractors submitting proposals will be required to make ordinary high water mark delineations in consideration of these Guidelines and to propose modifications of the documentation protocol to apply to the current project. The Ordinary High Water Mark Delineation Guidelines document can be downloaded at www.swc.nd.gov under Reports and Publications. Alternatively, a copy of these Guidelines can be requested by calling 701-328-2750.

Because the area to be delineated for the OHWM has been inundated or potentially inundated, the contractor may not rely on observations of the current location of the OHWM where it may be exposed in making the determination. Determination of the OHWM must be made using historical information and current technology to interpret this historical information.

III. SCOPE OF WORK.

Ordinary High Water Mark Delineations

The contractor will be expected to:

- Make ordinary high water mark delineations in the area(s) listed in Section I.
- Conduct delineations in compliance with North Dakota's Ordinary High Water Mark Delineation Guidelines including completing a delineation data form (to be proposed by contractor) at each delineated point.
- Conduct OHWM delineation points on a frequency of not less than 6 per mile on each side of the river or more if necessary. Contractor may propose some other approved methodology that will accurately delineate sovereign land and private property in the project area.
- Place markers on the photos where the ordinary high water mark has been delineated in the project area. Include photographs in the appendices.
- Provide estimates of acres below the OHWM in each quarter section using available section corner information and shape files. If section corners are not available, then the corners may be estimated based on the best available information. It is not necessary to establish section corners which have not been recorded.
- Provide a detailed narrative explaining the delineation techniques you used such as laser imagery, stereography, orthogonal projection, three-dimensional imagery, or any other available and reliable methodology. Identify the photo series with the date and scale you select, and describe the process, including the number of cross-sections and methodology for connecting the plot points.
- Contractor shall develop a Geodatabase (GDB), based on the model use by State for previous OHWM work and fully compatible with that model, to be used to maintain the spatial datasets required to complete the project. A Feature Dataset will be created within the (GDB), containing three Feature Classes, including:

❖ Transect: Point Geometry Type

- ❖ OHWM-Line: Polyline Geometry Type
- ❖ PLSS-Quarters: Polygon Geometry Type

In addition to the three Feature Classes, the GDB will contain various tables which will be used to maintain attribute data connected to the Transect Feature Class. The Contractor will provide to the State a Personal Geodatabase (PGDB) containing all spatial and attribute data developed under this contract.

- Contractor shall utilize PLSS datasets from the Federal Bureau of Land Management Geographic Coordinate Database (GCDB) as the parcel fabric in which section and quarter line features within the PLSS-Quarters dataset are developed. The PLSS-Quarters dataset will maintain features depicting the boundaries of sovereign lands and the non-sovereign ownership as polygons will be provided as part of the PGDB. From this dataset the contractor shall calculate the acres below the OHWM in each quarter section.
- Provide four (4) hard copies of the final report.
- All aerial photography and other maps purchased by the contractor, whether hard copy or electronic, shall be deemed to be the property of the State and shall be turned over to the State at the completion of the project. Contractor may keep copies at contractor's expense.
- All work product, equipment or materials created or purchased under this contract shall belong to the State and must be delivered to the State at State's request upon termination of this contract. Contractor agrees that all materials prepared under this contract are "works for hire" within the meaning of the copyright laws of the United States and shall assign all rights an interest Engineer may have in the materials it prepares under this contract, including any right to derivative use of the material. Contractor shall execute all necessary documents to enable State to protect its rights under this section.

IV. PROPOSAL REQUIREMENTS AND SELECTION CRITERIA.

State requests the following material for use in the selection of a contractor:

1. Past Performance -

A. Preliminary Estimating Accuracy:

Contractors are asked to submit two (2) examples of recent OHWM delineation projects and identify the methodology used for each. Indicate the delineation cost estimate, the actual delineation cost, the date of completion, and the location of the projects.

B. Project Experience - (Unlimited time period)

Contractors are asked to submit appropriate material demonstrating their experience with OHWM Delineations. Experience with interpreting aerial photography and vegetation on aerial photography is desired.

2. The Ability of Professional Personnel -

Identify your project team. Provide resumes with particular emphasis on the qualifications of the principals and delineation team members proposed for the project including a clear definition of their primary responsibility for this project. The section shall include:

- A. An organizational chart for all members proposed for the project. List any in-house or out-of-house special consultants. Identify their function within the delineation team. Identify their experience with similar type projects and/or their specific skills, training and certifications as applicable.
- B. The names of employed persons that will be designated as the project manager and principal delineation member(s). Indicate the person that will serve as the point of contact for all matters relating to management of contract and delineation services.
- C. A statement of qualifications concerning the experience and capabilities of the contractor and its personnel pertaining to the processes outlined in the North Dakota OHWM Delineation Guidelines.

3. Recent/Current and Project Workload of the Contractor or Firm -

Recent/current and project workload of the firm shall be accompanied by:

- A. Indicate specific current project commitments of persons listed in Section 2, part B. Indicate your agreement, unless prevented by circumstances outside your control, to retain the project manager and the principal delineation team member on the project until all work of this contract is completed.
- B. Indicate general availability of all personnel included in Section 2, part A.

4. Willingness to Meet Time and Budget Requirements -

- A. Provide two (2) reference projects where the members of the delineation team completed similar delineation projects on time and within the owner's budget. Include specific contact personnel.
- B. Present an outline of the basic work plan anticipated to accomplish the project as understood by the delineation team. Present a schedule pertaining to ordinary high water mark delineations in the project area, including the approximate earliest starting date and estimated time of completion.
- C. Present cost estimate to delineate the OHWM in the areas specified in Sections I-A.

5. Location -

Indicate proximity and availability to Bismarck, North Dakota understanding that this work can be done most efficiently at your home base. The successful bidder will be required to make two trips to Bismarck during the contract development, three trips to Bismarck to present status reports during the project and one trip to Bismarck to present the draft final report.

6. Recent and Current Work for the Agency -

Indicate recent and current work with the State of North Dakota over the last five years. Include estimated or actual fees. (Required)

7. The above referenced criteria are not an all-inclusive listing of items that will be considered in the final selection of a contractor.

V. SUBMITTAL PROCEDURES OF PROPOSALS AND COST ESTIMATES.

- A. Contractors wishing to be considered shall, no later than 5:00 PM CT, October 16, 2009, submit three copies of their proposals and cost estimates to:

North Dakota State Land Department
ATTN: Gary Preszler, Commissioner
1707 North 9th Street
Bismarck, ND 58506-5523
Telephone: (701) 328-2800
Email: gpreszle@nd.gov

All proposals must be in printed form, submitted in an envelope clearly marked **"Proposal for Information and Photograph OHWM Survey Services."** Proposals may not be submitted by electronic or facsimile means. Proposals submitted after the deadline will not be reviewed and will be rejected.

- B. Sequence of Events: the following represents the sequence of events contemplated in the qualification and selection procedure established for retaining a contractor and project completion:

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| • <u>Advertise for Proposal</u> | <u>September 8 through October 13, 2009</u> |
| • <u>Final RFP Questions Accepted</u> | <u>October 6, 2009</u> |
| • <u>Proposals Due</u> | <u>October 16, 2009</u> |
| • <u>Review Proposals and Prepare Shortlist</u> | <u>October 19-23, 2009</u> |
| • <u>Interview Contractors</u> | <u>October 26-30, 2009</u> |
| • <u>Selection Notification and Negotiations</u> | <u>November 2-6, 2009</u> |

- C. Any modifications to the above schedule will be in writing, and all contractors who have submitted proposals will be notified of any such modifications either by mail or by email. Proposals will be evaluated by a Selection Committee, which consists of the Land Commissioner, or his designee, the Surface Management Director, or his designee and the Director of Minerals Management, or his designee. The Committee's choice will be based upon an analysis of the proposal, not just the lowest price. Preference will be given to those contractors providing demonstrated capability and experience in similar services and projects.

VI. ADDITIONAL INFORMATION.

- A. All non-resident corporations, LLC's, and LLP's must be registered with the Secretary of State to do business in North Dakota before they can enter into the contract.
- B. The State of North Dakota will not include an arbitration clause in any contract with the successful firm.
- C. Prior to contracting, the winning contractor will be required to show evidence of the insurance coverage of the kind and amount as set out in Exhibit A, attached to this RFP/RFI.
- D. Explain and provide information concerning any suits filed, judgments entered or claims made against the firm during the last five years with respect to surveying services provided by the firm or any declaration of default or termination for cause against the firm with respect to such services. In addition, state whether during the past five years the firm has been suspended from bidding or entering into any government contract.
- E. Unless otherwise specified, all formal proposals submitted shall be binding for 90 calendar days following the submittal date.

VII. QUESTIONS. All questions concerning this RFP/RFI shall be referred in writing to:

Gary Preszler, Commissioner, at address or e-mail stated on the previous page.
(Questions may be submitted by e-mail).

All such questions shall be submitted no later than October 6, 2009, and each firm will receive a written response to its question(s). Additionally, any questions determined to be of interest to all prospective firms will be answered in writing and provided to all firms either by mail or by e-mail. No contractor may contact any other employee or elected or appointed official of the State Land Department with respect to the RFP/RFI or the submission of a proposal.

VIII. RESERVED RIGHTS.

- A. Right of Rejection -
The State reserves the right to reject any and all proposals.
- B. Right to Negotiate -
The State reserves the right to negotiate with one or more contractors to arrive at a final selection. This includes the right to negotiate all proposed elements to ensure the best possible consideration be afforded to all parties concerned. If the State fails to reach an agreement with the successful contractor, then the State may commence negotiations with an alternative contractor, or reject all proposals and reinstitute the RFP/RFI process.

IX. APPLICABLE OPEN RECORDS LAWS.

The laws of North Dakota require that, at the conclusion of the selection process, the contents of all proposals shall be placed in the public domain and be open to inspection. Information that is claimed by the contractor to not be subject to disclosure to the public must be recognized as such under applicable North Dakota Open Records Laws. Any information which the contractor desires to have withheld must be clearly identified in the proposal, but the determination on whether the information is not subject to disclosure, pursuant to applicable state laws, rests solely with the State.

END OF REQUEST FOR QUALIFICATIONS

INDEMNIFICATION AND INSURANCE

Indemnity:

- a. Contractor agrees to indemnify, save and hold harmless, the State of North Dakota, their officers, agents, employees and members from all liabilities, claims, actions, suits, cases, assertions of right, reasonable settlements, judgments, reasonable alternative dispute resolutions, and/or costs, expenses and attorneys' fees, that arise out of and are limited to acts, errors, or omissions of the Contractor and the employees, agents, sub-consultants, officers, and members of Contractor, in the performance of this contract or matters incidental thereto, except for claims arising out of the State's sole negligence. Contractor also agrees to indemnify, save and hold the State harmless for all costs, disbursements, and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein.
- b. Contractor's obligation to indemnify the State shall be derived by multiplying all liabilities, reasonable settlements, judgments, reasonable alternative dispute resolutions, and/or costs, expenses and attorneys' fees incurred by or assessed against the State times the percentage of fault attributable to Contractor. Contractor's obligation to indemnify on a claim resolved other than through a court judgment shall be an amount equal to the percentage of fault attributable to Contractor, as agreed to by the parties, multiplied times all liabilities, reasonable settlements, judgments, reasonable alternative dispute resolutions, and/or costs, expenses and attorneys' fees incurred by or assessed against the State.
- c. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor shall also defend, indemnify, and hold the State harmless for all costs, expenses, and attorneys' fees incurred in establishing and litigating the indemnification coverage provided in this section. The obligation in this section shall continue after termination of this contract, or any extensions or renewals of it.

Insurance:

Contractor shall secure and keep in force during the term of this agreement, and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of the agreement from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

- a. Commercial general liability, including contractual coverage, and products or completed operations coverage (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- b. Professional errors and omissions, including a three-year "tail coverage endorsement," with minimum liability limits of \$1,000,000 per occurrence and in the aggregate.
- c. Automobile liability with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
- d. Workers compensation coverage meeting all statutory requirements, if required.
- e. Employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

1. Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. The amount of any deductible or self-retention is subject to approval by the State.

Exhibit A – continued

2. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
3. The State will be defended, indemnified, and held harmless by the Contractor as set forth above.
4. The State shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the rights and coverages as the Contractor under these policies. The additional insured endorsement for the commercial general liability policy shall be written on a form equivalent to the ISO 1985 CG 20 10- form, or any other form as approved by the State, and shall not limit or delete the State's coverage in any way based upon the State's acts or omissions.
5. The insurance required in this agreement, though a policy or endorsement, shall include:
 - a. a "Waiver of Subrogation" waiving any right of recovery the insurance company may have against the State;
 - b. a provision that the policy and endorsements may not be canceled or modified without 30 days' prior written notice to the State.
 - c. a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
 - d. a provision that the Contractor's insurance coverage shall be primary (i.e., pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be excess of the Contractor's insurance and shall not contribute with it; and
 - e. cross liability-severability of interest coverage for all policies and endorsements.
6. The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary.
7. The Contractor shall furnish a certificate of insurance and all endorsements to the State before commencement of this agreement.
8. Failure to obtain and maintain insurance as required throughout the term of this agreement is a material breach of contract entitling the State to terminate this agreement immediately.